

2013 WL 2295687 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Ernest H. BLACKBURN, Personal Representative of the Estate of Billie
Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn, Plaintiff,

v.

Ensign SABINO, L.L.C., a Nevada limited liability company doing business as Sabino Canyon Rehabilitation and Care Center; Bandera Healthcare, Inc., a California corporation; the Ensign Group, Inc., a Delaware corporation; Ensign Facility Services, Inc., a Nevada corporation; Christine Jones, Administrator; Cornerstone Hospital of Southeast Arizona, L.L.C., a Delaware limited liability company; Cs Healthcare Arizona, L.L.C., a Delaware limited liability company; Cornerstone Healthcare Group Holding, Inc., a Delaware corporation, Christine Hansen, Chief Executive Officer/Administrator and John Does 1-250; Defendants.

No. C20101401.
January 16, 2013.

[motion in Limine No. 3]
(Trial Date: January 23, 2013)

Plaintiff's Supplemental Response Re the Admissibility of the Regulations

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(Assigned to the Honorable James Marner).

Plaintiff, by and through counsel undersigned, hereby responds to Defendants' Motion in Limine #3 and to the Court's request for supplemental briefing on the issue of the admissibility of certain regulations. The regulations are properly admissible as relevant evidence of the standard of care in this action. Plaintiff has presented the two regulations at issue to Defendants to attempt to secure their agreement on the regulations' admissibility. Plaintiff, however, has been unable to secure such agreement from Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFF IS ENTITLED TO USE EVIDENCE OF STATE AND FEDERAL HOSPITAL REGULATIONS AS A BASIS FOR THE STANDARD OF CARE.

Billie Blackburn's family admitted her to Defendants' facility, Cornerstone Hospital, believing she would receive proper and appropriate care that conformed to the standards set for hospitals by federal law and those laws enacted by the State of Arizona. A violation of a regulation is evidence of negligence and is admissible under the Arizona Adult Protective Services Act to establish proof of **elder abuse** and neglect.

It is well settled that violation of a regulation or a statute is evidence of negligence. See RAJI (Civil) 4th, Negligence 1. The court in [Brand v. J.H. Rose Trucking Co.](#), 102 Ariz. 201, 205, 427 P.2d 519, 523 (1967), stated, "[f]rom the failure to heed a statute or regulation, the law conclusively infers a want of reasonable care." See also [Good v. City of Glendale](#), 150 Ariz.

218, 221, 722 P.2d 386, 389 (Ct. App. 1986) (“[A] person who violates a statute enacted for the protection and safety of the public is guilty of negligence per se.”). Other states have similarly held that violations of statutes and regulations are evidence of negligence. *See, e.g., Bridgforth v. Vandiver*, 225 Ark. 702, 284 S.W.2d 623 (1955); *Bussell v. Missouri Pac.c R. Co.*, 237 Ark. 812, 376 S.W.2d 345 (1964); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976).

In the analogous California case *In re Conservatorship of Gregory*, 80 Cal. App. 4th 514, 522, 95 Cal. Rptr. 2d 336 (2000), “[d]efendants argue[d] that although the regulations have nothing to do with the [California] Elder Abuse Act, and involve only the regulation of federal Medicaid payments, [plaintiff] effectively used them to create a private cause of action. They also complain [ed] the instructions were too vague to provide meaningful guidance to the jury.” The court found, “the question before us is not whether violation of these regulations gives rise to a private right of action, but whether the duly authorized regulations can be used to describe the care required under an *existing* statutory right of action for elder abuse. *Id.* (emphasis added).

The *Gregory* trial court instructed the jury in the language of California Welfare & Institutions Code § 15610.07 with regard to the abuse of an elder, and described how “[p]atients of skilled nursing facilities shall be treated and cared for” by reading portions of state statutes, and state and federal regulations governing patients' rights and patient care in skilled nursing facilities.” *Id.* at 19. The court also instructed the jury about the term “reckless neglect.” The *Gregory* court found that the instructions given “provided concrete examples which amplified the instruction on elder abuse based on Welfare and Institutions Code § 15610.07.” *Id.* at 20.

Likewise, in the California case of *Norman v. Life Care Centers of Am., Inc.*, 107 Cal. App. 4th 1233, 132 Cal. Rptr. 2d 765 (2003), the issue was whether California Code of Regulations, Title 22 [in large part modeled after and incorporating the federal regulations], serves as a proper regulation to warrant a negligence per se instruction. The Norman court held:

[W]e conclude the regulations in question impose on Life Care duties of care, and a breach by Life Care of those duties of care constitutes “[t]he negligent failure... to exercise that degree of care that a reasonable person in a like position would exercise.” Accordingly, a violation by Life Care of those regulations in caring for an elder constitutes elder abuse neglect under the [California Elder Abuse] Act.

Id. at 1246 (emphasis added) (citations omitted). The court went on to say:

Furthermore, the regulations clearly were intended to protect the health and safety of nursing home residents by requiring the initial development and updating of appropriate care plans for them and notification of their physicians if there is any change in conditions.

Id. at 1247. The conclusion of the court was that by refusing an instruction on negligence per se, the trial court precluded Norman from arguing that Life Care's alleged regulatory violations were presumed to constitute negligence and therefore neglect under her elder abuse cause of action. *Id.* at 1250.

Defendants' argument here views the regulations in isolation and outside the context of this case. Plaintiff will provide expert testimony from Dr. Joyce Black, who possesses the necessary expertise to explain to the jury the deficiencies in the standard of care in this case. The jury will not be read a set of regulations without context to them. Rather, the jury will be given extensive testimony regarding the standard of care and the deviations from it in this case, and will then be directed to the regulations that create a basis for the standard of care. In addition, Plaintiff is entitled to ask Defendants' own employees about their knowledge of the regulations, whether they are required to follow them and whether the facility complied with the regulation. As an example, Christine Hansen testified that she was familiar with the state and federal regulations governing long-term care facilities such as Cornerstone and it would be her expectation that her staff members would comply with these regulations. (Ex. 1 to Plaintiff's Resp. to Defs.' MIL #3, Deposition of Christine Hansen, p.49, line 13-24)

A consideration of the two relevant federal regulations makes clear their relevance to this action.

First, Defendants' documentation in Mrs. Blackburn's clinical record fails to comply with [42 C.F.R. § 482.24](#), *Condition of Participation: Medical Records Services*, based upon the numerous omissions and inconsistencies found in her chart. This federal regulation provides in relevant part:

...A medical record must be maintained for every individual evaluated or treated in the hospital...

(b) Standard: Form and retention of record. The hospital must maintain a medical record for each inpatient and outpatient. Medical records must be accurately written, promptly completed, properly filed and retained, and accessible.

(c)(1) All patient medical record entries must be legible, complete, dated, timed, and authenticated in written or electronic form by the person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures.

[42 C.F.R. § 482.24](#). See Ex. 1.

Second, Defendants' documentation in Mrs. Blackburn's clinical record fails to comply with [42 C.F.R. § 482.23](#), *Condition of Participation: Nursing Services*, based upon the numerous omissions and inconsistencies found in her chart. This federal regulation provides in relevant part:

(b) Standard: Staffing and delivery of care. The nursing service must have adequate numbers of licensed registered nurses, licensed practical (vocational) nurses, and other personnel to provide nursing care to all patients as needed.

(4) The hospital must ensure that the nursing staff develops, and keeps current, a care nursing plan for each patient.

[42 C.F.R. § 482.23](#). See Ex. 1.

In sum, Cornerstone failed to provide Billie Blackburn with the necessary care and services to maintain her health and well-being. The federal regulations discussed above are properly admissible as evidence of the standard of care under Gregory and Norman. i.e., the regulations create a standard of care to be provided by hospital operators to their patients and failure to meet this standard of care is evidence of negligence. Plaintiff's expert, Dr. Joyce Black, will provide the support for her opinions that Defendants violated the regulations based on her education, training, and experience. The appropriate foundation will be provided at the trial of this matter not only for the introduction of the regulations as evidence of the standard of care, but also how for their relevance in this case.

IV. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that the Court permit the relevant federal regulations to be admitted as evidence of the relevant standard of care.

Dated: January 16, 2013.

WILKES & MCHUGH, P.A.

By

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Mary Ellen Spiece, Esq.

Attorneys for Plaintiff

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